FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 10 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 65

TIMOTHY J. BREEN,

Petitioner,

—vs.—

SELECTIVE SERVICE LOCAL BOARD No. 16, Bridgeport, Connecticut and BRIG. GEN. ERNEST E. NOVEY, Individually and as Director of the Selective Service System for Connecticut,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EMANUEL MARGOLIS
25 Bank Street
Stamford, Connecticut

LAWRENCE P. WEISMAN
955 Main Street
Bridgeport, Connecticut

MELVIN L. WULF
156 Fifth Avenue
New York, New York

Attorneys for Petitioner

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes and Regulations Involved 3

Statement of the Case 3

Reasons for Granting the Writ 7

Introduction 7

A. Certiorari should be granted because the decision below conflicts with this Court's decision in *Oestereich* v. *Selective Service Local Board No. 11*, 37 U. S. L. Week 4053 8

B. Certiorari should be granted to determine whether Section 10(b)(3) precludes judicial review where it is claimed that a statute or administrative regulations are unconstitutional on their face and as applied 13

C. Certiorari should be granted to decide whether the punitive reclassification of petitioner violates the due process clause of the Fifth Amendment and the Sixth Amendment 15

D. Certiorari should be granted to decide whether the punitive use of delinquency and reclassification procedures, as in this case, is authorized by statute or regulation 18

PAGE

E. Certiorari should be granted to decide whether Reg. 1642.4, upon which petitioner's delinquency, reclassification, and induction order are based, is vague and overbroad 21

F. Certiorari should be granted to decide whether petitioner's surrender of his Registration Certificate was an act of speech protected by the First Amendment 23

CONCLUSION 26

TABLE OF AUTHORITIES

Cases:

Aptheker v. Secretary of State, 378 U. S. 500 (1964) .. 22
Armendariz v. Hershey, 37 U. S. L. Week 2461 (D. W. Tex., Feb. 5, 1969) 13, 14

Bartchy v. United States, 319 U. S. 484 (1943) 16

Clark v. Gabriel, 37 U. S. L. Week 3217 6
Clark v. Uebersee Finanz-Korporation, 332 U. S. 480 (1947) 3
Cramp v. Board of Public Instruction, 368 U. S. 278 (1961) 22

Dombrowski v. Pfister, 380 U. S. 479 (1965) 22, 23, 25

Eagle v. United States ex rel. Samuels, 329 U. S. 304 (1946) 16

Harris v. Ross, 146 F. 2d 355 (5th Cir. 1944) 17

PAGE

Kennedy v. Mendoza-Martinez, 372 U. S. 144 (1963) ..15, 16, 17

Kimball v. Selective Service Local Bd. No. 15, 283 F. Supp. 606 (S. D. N. Y. 1968) 13

NAACP v. Button, 371 U. S. 415 (1963) 22, 24

Oestereich v. Selective Service Local Board No. 11, 37 U. S. L. Week 4053 .....4, 6, 8, 9, 10, 11, 12, 13, 14, 15, 17

Public Utilities Commission v. United States, 355 U. S. 534 (1958) 14

Sherbert v. Verner, 374 U. S. 398 (1963) 24
Stromberg v. California, 283 U. S. 359 (1931) 23, 25

Thomas v. Collins, 323 U. S. 516 (1945) 24, 25
Thornhill v. Alabama, 319 U. S. 88 (1940) 24
Tinker, et al. v. Des Moines Independent Community School District, 37 U. S. L. Week 4121 24

United States v. O'Brien, 391 U. S. 367 (1968) 23, 24

West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943) 23-24
Wolff v. Selective Service, 372 F. 2d 817 (2nd Cir. 1967) 18, 22

U. S. Constitution:

First Amendment 2, 3, 7, 21, 23, 24, 25

Fifth Amendment 15

Sixth Amendment 2, 15

PAGE

Statutes and Regulations:

28 U. S. C. §1254(1) 2

Military Selective Service Act of 1967:

Section 1(c), 50 App. U. S. C. §451(c) 18

Section 6(g) 13

Section 6(h) 13

Section 6(h)(1), 50 App. U. S. C. §456(h)(1) 2, 3, 10, 12

Section 6(h)(2) 14

Section 6(m) 18

Section 10(b)(3), 50 App. U. S. C. §460(b)(3) 2, 3, 5, 9, 10, 13, 14, 15

Section 12 18

Section 12(a) 19

Section 12(a)(b) 16

Section 12(b) 17

Section 12(b)(6), 50 App. U. S. C. §462(b)(6) 18

Selective Service Regulations:

32 C. F. R. 1621.10 21

32 C. F. R. 1621.13 21

32 C. F. R. 1621.14 19

32 C. F. R. 1622.1(b) 19

PAGE

32 C. F. R. 1622.1(c) 17

32 C. F. R. 1622.5 3

32 C. F. R. 1622.10 17

32 C. F. R. 1622.25 12

32 C. F. R. 1623.2 17

32 C. F. R. 1624 17

32 C. F. R. 1625.1 17

32 C. F. R. 1625.1(c) 19

32 C. F. R. 1628.16 21

32 C. F. R. 1641.7 19

32 C. F. R. 1642 19

32 C. F. R. 1642.1 5

32 C. F. R. 1642.1(b) 17

32 C. F. R. 1642.6 5

32 C. F. R. 1642.4(a) 21

32 C. F. R. 1642.14(b) 20

32 C. F. R. 1642.15 5

Miscellaneous:

Amsterdam, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Rev. 67 (1960) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

TIMOTHY J. BREEN,

Petitioner,

—VS.—

SELECTIVE SERVICE LOCAL BOARD No. 16, Bridgeport, Connecticut and BRIG. GEN. ERNEST E. NOVEY, Individually and as Director of the Selective Service System for Connecticut,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Timothy J. Breen prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 10, 1969.

Opinions Below

The opinion of the District Court is reported at 284 F. Supp. 749 and is set forth in the Appendix, *infra*, pp. 42-53. The opinion of the Court of Appeals is unreported. It is set forth in the Appendix, *infra*, pp. 27-41.

Jurisdiction

The judgment of the Court of Appeals was entered on January 10, 1969. The jurisdiction of this Court is conferred by 28 U. S. C. Sec. 1254(1).

Questions Presented

Petitioner, a duly enrolled, full-time undergraduate student, was deferred from training and service in the Armed Forces under Section 6(h)(1) of the Military Selective Service Act of 1967 [50 App. U. S. C. Sec. 456(h)(1)]. Upon returning his Selective Service Registration Certificate to the government as a statement of protest against the war in Vietnam, petitioner was declared delinquent under the Selective Service Regulations, stripped of his deferment, reclassified I-A and ordered to report for induction. Under these circumstances:

1. Does Section 10(b)(3) of the Military Selective Service Act of 1967 [50 App. U. S. C. Sec. 460(b)(3)] preclude judicial review of petitioner's punitive reclassification and order to report for induction?

2. Does the declaration of delinquency, punitive reclassification, and induction of petitioner for failure to have his Registration Certificate in his personal possession, violate the due process clause of the Fifth Amendment, the Sixth Amendment, the Military Selective Service Act of 1967, and the Selective Service Regulations?

3. Does Selective Service Regulation 1617.1 [32 C. F. R. Sec. 1617.1], as construed and applied in this case, and

Selection Service Regulation 1642.4 [32 C. F. R. Sec. 1642.4] on its face, violate the First Amendment?

Statutes and Regulations Involved

Sec. 10(b)(3), Military Selective Service Act of 1967; 50 App. U. S. C. Sec. 460(b)(3) is set out in the Appendix, *infra*, p. 54.

Sec. 6(h)(1), Military Selective Service Act of 1967; 50 App. U. S. C. Sec. 456(h)(1) is set out in the Appendix, *infra*, pp. 54-55.

Selective Service Regulation 1622.25; 32 C. F. R. Sec. 1622.25 is set out in the Appendix, *infra*, pp. 55-56.

Selective Service Regulation 1642.4; 32 C. F. R. Sec. 1642.4 is set out in the Appendix, *infra*, p. 57.

Statement of the Case[1]

At all times relevant hereto, petitioner was a duly enrolled full-time undergraduate student at the Berkeley School of Music in Boston, Massachusetts. As a then nineteen-year-old citizen, the petitioner was classified II-S by Local Board No. 16 of Bridgeport, Connecticut, as required by 50 App. U. S. C. Sec. 456(h)(1) [hereafter Sec. 6(h)(1)], and 32 C. F. R. Sec. 1622.25.

On November 16, 1967, together with numerous other persons registered under the Military Selective Service

[1] The statement of the case is based upon the allegations in the complaint, taken as admitted upon the Government's motion to dismiss. *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480 (1947).

Act of 1967, petitioner delivered his Registration Certificate (SSS Form 2) to a clergyman for return to the Government of the United States, solely for the purpose of registering his dissent from participation by the United States in the war in Vietnam.

Thereafter, petitioner received a Delinquency Notice (SSS Form 304) mailed on January 9, 1968, informing him that on January 8, 1968, he had been "declared delinquent" because of "Failure to have Registration Certificate in your possession."[2] Simultaneously, on January 9, 1968, petitioner was reclassified from II-S to I-A.

As noted in the majority opinion below, these actions by Local Board No. 16 "were in line with a memorandum and letter dated respectively October 24 and October 26, 1967, from the Director of Selective Service" (App., *infra*, p. 28). This memorandum and letter (set forth in the Appendix, *infra*, pp. 59-62) addressed to all local Selective Service Boards, advised local boards, among other things, to deny deferments to any registrant who takes part in "any action that violates the Military Selective Service Act." The declaration of petitioner as a delinquent and his reclassification to I-A by the respondent Local Board was clearly in implementation of General Hershey's instructions.[3] The letter from General Hershey directed local

---

[2] The Delinquency Notice is set out in the Appendix, *infra*, p. 58.

[3] In its brief in *Oestereich* v. *Selective Service Local Board No. 11*, 37 U.S.L. Week 4053, the government conceded that "It is difficult to conclude that these statements [by General Hershey] did not in effect invite local boards to utilize delinquency reclassification in a punitive fashion" (p. 52).

boards to act on the basis of information received concerning so-called "illegal" demonstrations involving registrants such as the petitioner, on the strength of which classifications were to be re-opened, the registrant classified anew, "and if evidence of violation of the Act and Regulations is established, also to declare the registrant to be a delinquent and to process him accordingly."

On January 11, 1968, Local Board No. 16 mailed petitioner an order to report on January 29, 1968 for a physical examination (SSS Form 223). This examination was subsequently postponed.

In February, 1968, petitioner appealed his reclassification to the Selective Service Appeals Board under the provisions of 32 C. F. R. Sec. 1642.15 (R. 2-3).

On February 20, 1968, petitioner filed suit in the United States District Court, District of Connecticut, seeking a judgment that the declaration of his delinquency and his reclassification were null and void, an injunction against his induction into the armed forces, and $20,000 damages. Petitioner sought further to have Sections 1642.1-1642.46 of the Selective Service Regulations declared unconstitutional on their face and as applied to petitioner, and to declare unconstitutional the letter and memorandum of General Lewis B. Hershey.

Respondents moved to dismiss the complaint on March 8, 1968, on the grounds of lack of jurisdiction, relying upon Sec. 10(b)(3). Respondents also moved that the temporary restraining order issued by the Court on March 1, 1968, be dissolved. After a hearing and oral argument on March 8, 1968, the District Court granted respondents' motion to dismiss, on the grounds that the Court was deprived of jurisdiction by Section 10(b)(3).

Subsequent to the decision of the District Court, petitioner's administrative appeal was unanimously denied and he was ordered to report for induction. In April of 1968, pursuant to an order of his Local Board, petitioner submitted to a pre-induction physical examination and was determined to be physically fit for military duty. His order for induction was stayed by the District Court pending decision of the appeal by the court below. A further stay was granted by the Court of Appeals at the time of oral argument until such time as the case was decided by that court.

On January 10, 1969, the orders and decision below were affirmed (Judge Feinberg dissenting). The essential rationale of the majority opinion was that *Oestereich* v. *Selective Service System Local Board No. 11*, 37 U. S. L. W. 4053 was distinguishable from the case at bar, in that the former involved a statutory *exemption* and the latter a statutory *deferment*. Contenting itself with the conclusion that the conflict between the statute and the regulations which arose in *Oestereich* "is therefore not present here", the court stressed the decision of this Court in *Clark* v. *Gabriel*, 37 U. S. L. W. 3217.[4]

---

[4] The Court's reasoning in *Clark* should be noted, where it held:

"In Oestereich the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the board. Oestereich, as a divinity student, was by statute unconditionally entitled to exemption. Here, by contrast, there is no doubt of the board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being 'sustained by the local board.' 50 U. S. C. App. §456(g)."

On January 17, 1969, an application to stay the mandate, pending application for a writ of certiorari to the Supreme Court of the United States, was made to the Court of Appeals. The stay was granted and, on February 28, 1969, it was extended to and including March 10, 1969.

Reasons for Granting the Writ

Introduction

Certiorari should be granted in this case because it directly and immediately affects a substantial number of students within the Selective Service System, many of whom already have been reclassified from II-S to I-A, pursuant to the directives of General Hershey.

According to Selective Service statistics, the total number of registrants classified II-S was 1,807,060 on December 1, 1967 and 1,779,648 on December 1, 1968. It is self-evident that the grounds for reclassification of any such group of registrants, particularly in the highly sensitive First Amendment area, must be clearly defined by the courts. Such vast numbers of registrants are entitled to be able to predict the consequences of various kinds of acts and conduct, both private and public, in which they are likely to engage, whether on or off the campus.

According to statistics supplied by the Justice Department, 537 registrants were reclassified from II-S to Class I-A delinquent, during the twelve month period from December 1, 1967 to December 1, 1968 alone, purely as a result of having surrendered possession of their Selective

Service Cards.[5] All of these registrants, as well as additional numbers who have been similarly reclassified subsequent to December 1, 1968, will be directly affected by the determination of the issues in this case.

The large number of reclassifications during this brief period indicates the growing response by local boards throughout the country to the directives issued by General Hershey in October, 1967. These directives, and their implementation by local boards, have placed thousands of registrants in a position where the availability of pre-induction judicial review is of immediate significance.

In addition to the large number of registrants directly affected by the policy and procedures here at issue, no less significant is the number of registrants who have been silenced or inhibited out of fear that, should they engage in a similar or equivalent act of protest against the war in Vietnam or on other public issues, they too will lose their deferred status in spite of being full-time students. What is at stake, therefore, is the power of the government to place some 1,800,000 registrants in Class II-S in the position of surrendering their right to speak freely on questions of urgent public importance, or risk penalties and punishment for the free exercise of this right.

A. Certiorari should be granted because the decision below conflicts with this Court's decision in *Oestereich* v. *Selective Service Local Board No. 11*, 37 U. S. L. Week 4053.

In its decision in *Oestereich*, this Court characterized the use of the delinquency procedure in the circumstances

---

[5] Letter of February 14, 1969 from William D. Ruckelhaus, Assistant Attorney General, to Melvin L. Wulf, one of petitioner's attorneys.

of that case as "basically lawless" and a "clear departure" by the local Selective Service board from its mandate. It held that, if a board could withhold or withdraw an exemption from a registrant "for activities or conduct not material to the grant or withdrawal of the exemption" (i.e., the invocation of delinquency reclassification), it would have the effect of making local boards "free-wheeling agencies meting out their brand of justice in a vindictive manner". 37 U. S. L. Week at 4054.

The Court also noted that even if the Congress had authorized local boards to revoke Selective Service exemptions through the use of delinquency procedures, "serious questions would arise if Congress were silent and did not prescribe standards to govern the boards' actions." *Ibid.*

Oestereich stands for two propositions: First, that delinquency reclassification is unlawful if the registrant involved qualifies for a statutory exemption, and, second, that a bona-fide claim of such an unlawful reclassification is entitled to pre-induction judicial review despite the language of Section 10(b)(3). The underlying issue in the case at bar is whether this same reasoning and exception to Section 10(b)(3) applies to a registrant with a mandatory statutory deferment rather than a statutory exemption.

Petitioner's case is on all fours with the facts in *Oestereich*. Both involve full-time students enrolled as undergraduates in institutions of higher learning who took part in organized demonstrations in opposition to the war in Vietnam. Both cases involve an act of returning draft cards to the government. Neither involve either the destruction or mutilation of a draft card. Both registrants

were declared delinquent by their local boards pursuant to instructions contained in the Memorandum and letter which issued from the Director of Selective Service in October, 1967. Neither was given an opportunity for a hearing on the finding of delinquency, nor was either given the opportunity to clear up the delinquency. Both were reclassified I-A on the same day that they "became delinquent". The reason for the alleged delinquency in each instance was the failure to possess a Registration Certificate. Both were ordered to report forthwith for induction into the armed forces.

The teaching of *Oestereich* is clear: a student who is entitled by statute to an exemption from military service is entitled to judicial review of his reclassification, without having to make the harsh and risky choice of either defying induction and inviting criminal prosecution or submitting to induction and thereafter seeking judicial relief through habeas corpus. In *Oestereich,* this Court specifically relieved the registrant of that dilemma so as not to constitute Sec. 10(b)(3) "with unnecessary harshness." *Supra,* at 4054.

The argument that *Oestereich* involved an exemption for divinity students, whereas petitioner's case involves a deferment for undergraduates, and that therefore the two cases are distinguishable, is insubstantial.

The fact is that the deferment which is granted to undergraduate students under the Military Selective Service Act of 1967 is no less mandatory than the exemption for divinity students which is laid down in the same statute. Thus, Section 6(h)(1) provides in pertinent part:

> "Except as otherwise provided in this paragraph, the President *shall* under such rules and regulations as

> he may prescribe, *provide for the deferment* from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. *A deferment* granted to any person under authority of the preceding sentence *shall continue* until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. . . . " (Emphasis added.)

Here, as in *Oestereich,* Congress has declared as a national policy that persons such as petitioner who are "satisfactorily pursuing a full-time course of instruction at a college" shall be deferred until they reach the age of twenty-four, or obtain a baccalaureate degree or fail to pursue a full-time course of instruction "satisfactorily", whichever first occurs.

The statute goes even further, and may be construed as even stronger than the pertinent statutory provision in *Oestereich,* for it declares that such student deferments are not to be "substantially restricted or terminated" unless the President specifically finds that "the needs of the Armed Forces require such action". As Judge Feinberg correctly emphasized in his dissenting opinion below:

> "This is about as clear a statement of congressional intent as you can get, made all the more emphatic by its appearance in the Selective Service Act for the first time in the 1967 amendments" (App., *infra*, p. 37).

It is also to be noted that the 1967 Act changed the provisions of Sec. 6(h)(1) so as to make such student deferments mandatory, using the term "shall", in place of the prior discretionary language authorizing the President to provide for such deferment as was "found to be necessary to the maintenance of the national health, safety, or interest . . . ". Prior to the 1967 amendments, the implementing regulations (32 C. F. R. §1622.25) left the deferment of individual students to the discretion of the local board.

The majority opinion below attempts to circumvent the clear statutory command of Section 6(h)(1) by placing heavy emphasis on the phrase "under such rules and regulations as he [the President] may prescribe . . . " (App., *infra*, pp. 30-31). This ignores the introductory phrase of Sec. 6(h)(1) which governs it, namely, "Except as otherwise provided in this paragraph . . . " This controlling language requires that a student deferment "*shall* continue" until and unless one of several specified events take place, none of which have anything to do with an alleged delinquency for failure to possess one's draft card.

The word "delinquents" in Section 6(h)(1) is so obviously irrelevant to all of the provisions of that statute that it hardly merits attention. But the majority opinion, in distinguishing *Oestereich*, rests upon the fleeting reference to that word in a definition of the phrase "prime age group". However, to paraphrase the language of this

Court in *Oestereich,* the statutory deferment is "plain and unequivocal . . . and since the scope of the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right, or sufficiently buttressed by legislative standards, we conclude that pre-induction judicial review is not precluded in cases of this type." 37 U. S. L. Week at 4054-4055.

In light of the foregoing, it is not surprising that the dissenting opinion by Mr. Justice Stewart in *Oestereich,* which Justices Brennan and White joined, concedes that, to the extent that Section 10(b)(3) is no bar to judicial review in a case involving a statutory "exemption", it is equally so in the case of a statutory "deferment" which "may just as 'plainly' preclude a registrant's induction." 37 U. S. L. Week at 4058, note 9. At least one lower court has already decided that the distinction which the Government claims between the exemption provisions of Section 6(g) and the deferment provisions under Section 6(h) "is one without legal significance". *Kimball* v. *Selective Service Local Bd. No. 15,* 283 F. Supp. 606, 608 (S. D. N. Y. 1968). See also *Armendariz* v. *Hershey,* 37 U. S. L. Week 2461 (D. W. Tex., Feb. 5, 1969) (1-S deferment).

B. Certiorari should be granted to determine whether Section 10(b)(3) precludes judicial review where it is claimed that a statute or administrative regulations are unconstitutional on their face and as applied.

In his concurring opinion in *Oestereich,* Mr. Justice Harlan emphasized the importance of the validity of pre-induction judicial review where the governing statutes and regulations are attacked as facially unconstitutional. Petitioner's posture here is identical to that of *Oestereich* for it is his claim "that the very statutes or regulations which

the board administers are facially invalid", and therefore Section 10(b)(3) which has specific reference to "classification or processing" does not apply. 37 U. S. L. Week at 4055. The case at bar does not involve what Mr. Justice Harlan correctly characterized as "the numerous discretionary, factual, and mixed law-fact determinations which a Selective Service board must make prior to issuing an order to report for induction." *Ibid.*

Thus, the courts below were not asked to review factual or discretionary decisions inherent in the "classification or processing" of a registrant, which the statute is intended to prevent. Rather, they were asked to determine the constitutionality of an administrative procedure which was actually "beyond the competence of the Selective Service Boards to hear and determine". 37 U. S. L. Week at 4056. It is clear that the constitutionality of a federal statute is beyond the jurisdiction of administrative agencies. *Public Utilities Commission* v. *United States*, 355 U. S. 534, 539 (1958). This is especially true of local draft boards, given their composition.

A lower court has already applied these principles to a I-S registrant who was reclassified pursuant to another Hershey Memorandum which was incompatible with Sec. 6(h)(2). On the authority of *Oestereich* the court concluded that it was "beyond cavil that a statutory right cannot be taken away by Administrative fiat" and that the plaintiff's I-S request involved "only legal determinations by the board" which were therefore subject to judicial review. *Armendariz* v. *Hershey*, 37 U. S. L. Week 2462.

Any other reading of Sec. 10(b)(3), as Mr. Justice Harlan's concurring opinion in *Oestereich* makes clear, is incompatible with its constitutionality:

ion review in this case would,

"To withhold pre- of his liberty without the prior thus, deprive petit to any competent forum— opportunity to substantial claim that he was agency or court- ant to an unlawful procedure. ordered inducted of §10(b)(3) would raise seri- Such an interpre lems, and is not indicated by ous constitutiona nguage, or purpose." 37 U. S. the statute's hist L. Week at 4056

ion that the action of respon- It is petitioner's c orth in the following sections, dents, for the reason ns invalid on their face or as were based upon reg , Section 10(b)(3) cannot con- applied and that, the reclude pre-induction judicial stitutionally be held review.

C. Certiorari should b ed to decide whether the punitive reclassification of p er violates the due process clause of the Fifth Amen and the Sixth Amendment.

Kennedy v. *Mend rtinez,* 372 U. S. 144 (1963), spells out the criteria used to measure whether administrative sanction o be denominated penal or regulatory.

"The punitive of the sanction here is evident under the tests tionally applied to determine whether an Act gress is penal or regulatory in character, even t in other cases this problem has been extremely ult and elusive of solution. Whether the san volves an affirmative disability or restraint, whe has historically been regarded as a punishment, er it comes into play only on a finding of scient ther its operation will promote

> the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . ." 372 U. S. at 168-169.

Of the *Mendoza-Martinez* criteria, at least four clearly apply here.

(1) Induction "involves an affirmative disability or restraint." This could hardly be gainsaid, in light of the well-recognized facts of military life. Indeed, the availability of *habeas corpus* to secure release from the armed forces, *Eagle* v. *United States ex rel. Samuels,* 329 U. S. 304 (1946), necessarily rests upon such an hypothesis.

(2) Induction premised upon delinquency "comes into play only on a finding of *scienter.*" The Act makes it an offense to "knowingly" fail or neglect to perform a required duty. Sec. 12(a)(b). This Court has imposed the same criminal *mens rea* requirements upon liability for delinquency status, reclassification, and induction consequent thereon. *Bartchy* v. *United States,* 319 U. S. 484 (1943).

(3) Punitive reclassification followed by induction is designed to "promote the traditional aims of punishment—retribution and deterrence." The delinquency notice (SSS Form 304) resolves any doubt on this score, for it informs the delinquent registrant that unless he brings himself into conformity with his duties under the Act and Regulations, he will be subject to reclassification to Class I-A or

to prosecution. One is at a loss to imagine any functions other than deterrence and retribution which might be served by taking a registrant out of a classification in which he otherwise belongs—like IV-D (ministerial), IV-F (unfit for service), II-S (student), or III-A (dependency) —and reclassifying him for immediate induction into the armed forces.

(4) "[T]he behavior to which [punitive reclassification and induction] applies is already a crime," under Section 12(b) of the Act.

If the Court should hold that petitioner's induction is punishment, it would then be obliged to decide whether the punishment was imposed with due process of law. We believe the Court could not but conclude that due process is entirely absent from the procedures leading to petitioner's induction.

The procedures denied include the following: counsel [Reg. 1642.1(b)]; confrontation and cross-examination [see *Harris* v. *Ross*, 146 F. 2d 355 (5th Cir. 1944)]; compulsory process [Reg. 1642.1(b)]; privilege against self-incrimination [Regs. 1622.1(c), 1622.10, 1623.2, 1625.1]; burden of proof [Regs. 1622.1(c), 1622.10]; an impartial tribunal; public trial [Regs. Part 1624]; jury trial.

As the Court observed in *Mendoza-Martinez*, "If the sanctions these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further." 372 U. S. at 167.[6]

---

[6] In its brief in *Oestereich*, the government conceded that:

"If the essential purpose actually underlying delinquency reclassification is to punish registrants for their failure to comply

D. Certiorari should be granted to decide whether the punitive use of delinquency and reclassification procedures, as in this case, is authorized by statute or regulation.

The Military Selective Service Act of 1967 declares that service in the armed forces is an obligation and privilege. Section 1(c), 50 App. U. S. C. Sec. 451(c). This view of service is also reflected in Section 6(m) of the Act which allows, if it does not encourage, exclusion from service of those convicted of offenses punishable by imprisonment for a term exceeding one year.

Nonetheless, respondents here have presumed to invoke the delinquency and reclassification procedures against petitioner because he violated Reg. 1617.1 which requires registrants to have their registration certificates in their personal possession, a requirement enforceable under the Act's penal provision. Section 12(b)(6), 50 App. U. S. C. Sec. 462(b)(6). Thus, the circumstances here are the same as in *Wolff* v. *Selective Service,* 372 F. 2d 817 (2nd Cir. 1967), where the Second Circuit held that the draft boards "exceeded their jurisdiction" when they undertook to declare registrants delinquent on the ground that they violated the Act's penal provisions. 372 F. 2d at 820. " . . . [N]o regulation authorizes a draft board to declare a registrant a delinquent or to reclassify him for such action." *Id.* at 821.

As *Wolff* points out, however, jurisdiction of some offenses under Section 12 is shared by the District Courts

---

with their duties under the Selective Service law and regulations, a serious constitutional question is raised, since none of the required constitutional safeguards traditionally associated with criminal punishment are provided" (p. 49).

and the local boards. The decision refers explicitly to that portion of Section 12(a) which makes it a crime for any person knowingly to "fail or neglect or refuse to perform any duty required of him under or in execution of this title." Thus, as the Second Circuit said, "a parallel clause of the regulations provides that if a registrant fails to produce certain requested information or to appear for questioning, he may under 32 C. F. R. §1642.4(a) be declared a delinquent and classified or reclassified I-A." 372 F. 2d at 821.

The question here, therefore, is whether the possession requirement of Reg. 1617.1 is the kind of "duty" which, if not performed, can be the basis for delinquency and reclassification. We believe it is not.

The principal responsibility of local boards is to select young men for induction into the armed forces. "Classification is the key to selection . . . ", Reg. 1622.1(b), and the key to classification is "pertinent" information. Reg. 1622.1 (b). The regulations empower the boards to secure this information in a wide variety of ways. See Regs. 1621.14, 1622.1(b), 1625.1(c), 1641.7.

Information being the key to classification, the local board must have some device by which to secure that information from uninformative registrants. That device is the delinquency procedure. Regs. Part 1642.

Delinquency, properly viewed, is analogous to civil contempt. It is designed not to punish for past acts, but to coerce compliance with the procedures of the system leading up to classification. Delinquency status says to the registrant: until you bring yourself into compliance with the rules designed to enable your local board to ensure that

you are properly classified, you will be treated as having waived all the benefits of the System's procedures, and therefore as available for immediate induction.

The delinquency regulations explicitly provide for the expunging of delinquency—indeed, they relax the ordinary rule that a reopening of classification cannot be had after an order to report for induction, thereby allowing the registrant to conform to the requirements of Selective Service procedure right up to the last moment. Reg. 1642.14(b). The registrant is not bound by his waiver of the System's procedural rights until he is actually in the armed forces. Up until the very last moment he can, by cooperating with the procedures which enable his local board to make appropriate classification decisions, receive consideration of his claim that he should not be considered available for immediate induction. *Ibid.* The "Delinquency Notice" itself requests the registrant to contact his local board at once—obviously with an eye to clearing up the alleged default.

Possession by a registrant of his registration certificate plainly has nothing to do with the ability of a local board to perform its classification function. In no way is the board's consideration of the propriety of a registrant's current classification (or a classification he claims), or its ability to maintain official contact with him, impeded or affected by whether or not he happens to possess the required document.

It follows from the fact that the possession requirement is not an integral part of the relationship between a local board and its registrants, that to use reclassification as a sanction to enforce the requirement is to use it as punish-

ment—not as mere "civil" enforcement of the rules of the classification procedure.

Acts unrelated to the classification process itself may be crimes under the Act. As such, they may well be punishable —after a fair trial, before an impartial judicial tribunal, with all of the required procedural safeguards and rights. They may not, under the Regulations, the Act, or the Constitution, be punished in summary proceedings appropriate only for "civil" enforcement of the rules of the classification process.

E. Certiorari should be granted to decide whether Reg. 1642.4, upon which petitioner's delinquency, reclassification, and induction order are based, is vague and overbroad.

Reg. 1642.4(a) authorizes declarations of delinquency (and consequent I-A classification and priority induction) of a registrant who "has failed to perform any duty or duties required of him under the selective service law. . . ." As construed by the government in this and other cases, the regulation can be and has been applied to punish a registrant for exercising First Amendment rights.

An examination of the regulations demonstrates that the delinquency provisions are designed to serve the discrete purpose of securing information needed for intelligent classification (see Sec. D, *supra*). Consequently, the "duties required" under Reg. 1642.4(a) are properly limited to such things, for example, as the duty to return the Classification Questionnaire within 10 days (Reg. 1621.10), the duty to correct an inadequate Questionnaire (Reg. 1621.13), and the duty to report for physical examination (Reg. 1628.16). But as we have seen, the regulation has in fact been construed to include not only the alleged "duty" by

petitioner to possess his registration certificate, but also the kind of "duty" said to have been owed by the appellants in *Wolff* v. *Selective Service, supra.* According to General Hershey, it could, and should, be construed also to include the "duty" not to violate the Act in its entirety, as well as its "related processes", and not to perform acts "under unfortunate influences of misdirected emotions . . . or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation. . . ." App., *infra,* p. 60.

A statute or regulation which lends itself to such broad interpretation runs afoul not only of the general rule against vague statutes, see, e.g., *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 (1961); Amsterdam, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. Law Rev. 67 (1960), but also the rule in *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965), which condemns statutes with an "overbroad sweep . . . [which] lend themselves too readily to denial of [First Amendment] rights." 380 U. S. at 486.

In *Aptheker* v. *Secretary of State,* 378 U. S. 500, 508 (1964), this Court said, "It is a familiar and basic principle . . . that 'a governmental purpose to control or prevent activities constitutionally subject to . . . regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'" And the Court repeated the admonition set out in *NAACP* v. *Button,* 371 U. S. 415 (1963): "[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." 378 U. S. at 516.

The way in which Reg. 1642.4 has been applied, brings it squarely within the doctrine which forbids overbroad legislation which invades rights protected by the First Amendment. The National Director of Selective Service having actively and publicly encouraged local boards to impose the sanctions on "misguided registrants", surely his interpretation of the regulation has had the effect of "discouraging protected activities," *Dombrowski* v. *Pfister, supra* at 490, and "chilling . . . protected expression". *Id.* at 494. Reg. 1642.4 should be struck down in its entirety because to deal with "only a narrow portion of the prohibition at any one time" will not contribute "materially to articulation of the statutory standard." *Id.* at 491.

F. Certiorari should be granted to decide whether petitioner's surrender of his Registration Certificate was an act of speech protected by the First Amendment.

Petitioner alleged in his pleadings below, and has consistently maintained, that the surrender of his Selective Service Registration Certificate in order to protest the Vietnam war was a symbolic act of speech directed to a major public issue. As such, it was within the protection of the First Amendment guarantee of free speech. Since neither the destruction nor mutilation of the Certificate is involved, the facts of this case are distinguishable from those in *United States* v. *O'Brien*, 391 U. S. 367 (1968).

A consistent line of First Amendment cases has established the doctrine that symbolic action may often be protected speech under the First Amendment. Thus, "freedom of speech" has been held applicable to a whole gamut of cases, running from the display of a red flag in *Stromberg* v. *California*, 283 U. S. 359 (1931), to refusal to salute the American flag in *West Virginia State Board of Education*

v. *Barnette,* 319 U. S. 624 (1943), to picketing by labor unions in *Thornhill* v. *Alabama,* 319 U. S. 88 (1940), to wearing black arm-bands in school in protest against the war in Vietnam in *Tinker, et al.* v. *Des Moines Independent Community School District,* 37 U. S. L. W. 4121.

Symbolic conduct such as the turning over of a draft card to a clergyman should be considered speech or expression within the protection of the First Amendment because it is peaceful in its content and directly relevant to the issue giving rise to the protest. Thus, in *Tinker,* the Court emphasized that petitioners were being punished for a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance" on their part. 37 U. S. L. Week at 4122. Obviously, not all speech and expression is protected under the Constitution, particularly where "nonspeech" elements are involved. See *United States* v. *O'Brien, supra.* The courts have confronted, for more than a century, the need for balancing the necessity for an ordered society against the equally vital constitutional requirement that the freedoms of speech and assembly must be protected for that society to be democratic. This "delicate balance" has perenially required resort to such criteria as reasonableness, relevancy, and peacefulness, in weighing whether or not the action in question is constitutionally protected. But only the most "compelling" and "paramount" considerations have been held to justify infringement upon First Amendment freedoms where their exercise is *both* peaceful *and* relevant, as was surely the case with petitioner's action in turning over his draft card to a clergyman. See, for example, *NAACP* v. *Button, supra; Thomas* v. *Collins,* 323 U. S. 516 (1945); and *Sherbert* v. *Verner,* 374 U. S. 398 (1963).

This Court has repeatedly recognized that conduct which is aimed at changing government policy by appealing to the government should be protected. It is only in this way that we insure that the government will be responsive to the will of the people. In *Stromberg* v. *California, supra* at 369, this Court held:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

Thus, this Court has repeatedly recognized the importance of First Amendment rights as they relate to the democratic process. Equal sensitivity has been demonstrated in numerous decisions to the fragility of these constitutional rights, particularly when their exercise involves issues of critical current national importance.

The Court has shown its concern not only with direct attempts to infringe upon such rights, but with all statutes, regulations, ordinances and the like which have an indirect but potentially limiting effect upon the exercise of First Amendment rights. Thus, statutory schemes which are found to impose restraints upon the freedoms of speech and assembly, or which merely are found to have a "chilling effect" upon their exercise, have been held to violate the Constitution. *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). It is in this tradition that the Court, ever since *Thomas* v. *Collins, supra,* has allowed "the widest room for discussion, the narrowest room for its restriction . . .". At 530.

The danger to the "transcendent value" of freedom of expression is clearly manifest in the present case. Some of the vital questions associated with the war in Vietnam have been and continue to be the effect of the war on our defense posture, our economy, our foreign relations, and our urban problems, to mention only a few. Symbolic protests such as peaceful marches, peaceful vigils, and the peaceful transmission of draft cards either directly to Washington or through the intermediary of a clergyman, have been among the most widely used methods for ventilating such issues and raising these questions before the government and the public alike.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

EMANUEL MARGOLIS
25 Bank Street
Stamford, Connecticut

LAWRENCE P. WEISMAN
955 Main Street
Bridgeport, Connecticut

MELVIN L. WULF
156 Fifth Avenue
New York, New York

Attorneys for Petitioner

March 10, 1969

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 47—September Term, 1968.

(Argued September 17, 1968 Decided January 10, 1969.)

Docket No. 32345

TIMOTHY J. BREEN,

Plaintiff-Appellant,

—v.—

SELECTIVE SERVICE LOCAL BOARD No. 16, Bridgeport, Connecticut and BRIG. GEN. ERNEST E. NOVEY, Individually and as Director of the Selective Service System for Connecticut,

Defendants-Appellees.

Before:

MOORE, FRIENDLY and FEINBERG,

Circuit Judges.

Appeal by a Selective Service registrant, who had held a student deferment and was reclassified I-A because of delinquency for failing to have a registration certificate in his possession, from an order of the District Court for Connecticut, William H. Timbers, *Chief Judge,* dismissing for want of jurisdiction a complaint seeking to enjoin his induction. Affirmed.

EMANUEL MARGOLIS, Stamford, Conn. (Lawrence P. Weisman, Bridgeport, Conn.), *for Appellant.*

JON O. NEWMAN, United States Attorney, Hartford, Conn., *for Appellees.*

FRIENDLY, *Circuit Judge*:

Plaintiff Breen, a 20-year old resident of Connecticut, is a registrant under the Selective Service System. He had held a II-S (student) deferment, 50 U. S. C. App. §456 (h)(1), 32 C. F. R. §1622.25, because of being an undergraduate at the Berkeley School of Music in Boston. In mid-November, 1967, he delivered his Selective Service Registration Certificate to a clergyman in Boston for the purpose of protesting United States involvement in the war in Vietnam. On January 9, 1968, his Local Board mailed him a notice, 32 C. F. R. §1642.4(b), that he had been declared a delinquent for failure to have the Certificate in his possession as required by 32 C. F. R. §1617.1. At the same time the Local Board reclassified him from Class II-S to Class I-A because of his delinquency, pursuant to 32 C. F. R. §1642.12, which authorizes such reclassification "regardless of other circumstances." These actions of the Board were in line with a memorandum and a letter dated respectively October 24 and 26, 1967, from the Director of Selective Service. The Local Board ordered Breen to report for a physical examination on January 29 but subsequently postponed this. Apparently Breen did not seek a personal appearance under 32 C. F. R. §1642.14. However, he appealed his reclassification under that same section.

In February 1968 Breen brought this action in the District Court for Connecticut, seeking a judgment that the

declaration of his d
null and void, an i
armed forces, and
was predicated on
the first could affo
dismiss the compl
court convoked. B
jurisdiction by §8(
81 Stat. 104, whic
Service Act, 50 U.
provision set forth
a considered opinio
denied Breen's.

ncy and his reclassification were
n against his induction into the
damages. Although jurisdiction
. C. §§1331, 1343 and 2201, only
sis.[1] The Government moved to
d Breen to have a three-judge
that the court was deprived of
e Military Service Act of 1967,
ded §10(b)(3) of the Selective
pp. §460(b)(3), by including the
nargin,[2] Chief Judge Timbers, in

After the decisio
trative appeal was
induction, but the
tion of this appeal
tember, we deferre
had set for early
No. 46, October T
plicability and vali
though in a somew

ted the Government's motion and
district court, Breen's adminis-
and he was ordered to report for
as stayed pending the determina-
the appeal reached us in Sep-
ion because the Supreme Court
nt *Oestereich* v. *United States*,
68, which also involved the ap-
the amendment to §10(b)(3) al-
rent context.

We now have t
Oestereich, —— U
the amendment in

efit of the Court's decisions in
— (1968), 37 L. W. 4053, holding
le to a claim by an exempt theo-

1 Plaintiff sough
by a conclusory s
value of $10,000
Board No. 12, 37
made no point a

the requirement of jurisdictional amount that the matter in controversy exceeds the of interest and costs. See *Wolff* v. *Local* 7, 826 (2 Cir. 1967). The Government has nor shall we.

2 No judicial re
of any registran
except as a defe
12 of this title,
or negatively to

be made of the classification or processing boards, appeal boards, or the President, riminal prosecution instituted under section registrant has responded either affirmatively o report for induction . . . .

logical student that the delinquency regulations could not be applied to him, and in *Clark* v. *Gabriel*, —— U. S. —— (1968), 37 L. W. 3217, holding the amendment valid and applicable to the rejection of a claim of conscientious objection. While neither decision reads precisely on the issue here tendered, applying their teaching as best we can, we affirm the judgment of the district court.

Oestereich, a student at a theological school preparing for the ministry, who had been declared delinquent for having turned in his registration certificate, was entitled under §6(g) to an exemption from military service and not merely to a deferment of his obligation. The element critical to the holding that the amendment to §10(b)(3) was inapplicable in his case was the Court's view that:

> Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption.

Since the Board's action in depriving a divinity student of the exemption which was his "statutory right" was therefore "blatantly lawless" and "involved a clear departure by the Board from its statutory mandate," to read the statute as forcing Oestereich to choose between induction and a criminal prosecution before he could vindicate his rights would be "to construe the Act with unnecessary harshness."

In contrast, §6(h)(1) of the Selective Service Act, 50 U. S. C. App. §456(h)(1), dealing with the deferment of undergraduates, on which Breen relies, directs:

> Except as otherwise provided in this paragraph, the President shall, *under such rules and regulations as*

> *he may prescribe,* provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. (Emphasis supplied.)

While 32 C. F. R. §1622.25 provides for the placing of undergraduates in Class II-S, §1642.12, promulgated by the President on July 4, 1967, Ex. Order No. 11360, 32 F. R. 9794, authorizes their removal from that classification on a declaration of delinquency. Arguments that this provision offends the "Except as otherwise provided" language with which §6(h)(1) begins or that the "rules and regulations" must be relevant to the deferment (e.g., the obtaining of certain grades), collide with the fact that in the last sentence of §6(h)(1)[3] Congress expressly recognized the long-standing provision for reclassification and early induction of delinquents with respect to student deferments. This is clear evidence that Congress did not suppose that reclassification pursuant to the delinquency regulations would violate the provision of §6(h)(1) that

> Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action.

The conflict between statute and regulations that arose in *Oestereich* is therefore not present here.

---

3 The congressional committee reports on the extensive amendments to the Selective Service Act in 1967 explicitly take note of the existence of the delinquency regulations. S. Rep. No. 209, 90th Cong., 1st Sess. 3, 6; H. Rep. No. 267, 90th Cong., 1st Sess. 17.

We consequently find no sufficient justification in this case for denying to the words of the 1967 amendment to §10 (b)(3), see fn. 2, the meaning which they so plainly have and which the Committee reports, set forth in the dissenting opinion in *Oestereich,* —— U. S. at ——, show they were intended to have. As recognized in Mr. Justice Harlan's concurring opinion in *Oestereich,* —— U. S. at ——, fn. 7, "Section 10(b)(3) was likely precipitated by the Second Circuit's well publicized decision in Wolff v. Selective Service Local Board No. 16, 372 F. 2d 817 (1967)." See, to the same effect, the dissenting opinion of Mr. Justice Stewart, joined by Justices Brennan and White, —— U. S. at —— & fn. 5. If Congress meant to withhold the preinduction review we had granted in *Wolff* to students enjoying deferments who had been declared delinquent for acts not within the regulations, it surely must have intended to do this where, as here, there has been an undisputed violation of 32 C. F. R. §1617.1 requiring continued possession of a certificate—a requirement which the Supreme Court has characterized as serving "a legitimate and substantial purpose in the system's administration." *United States* v. *O'Brien,* 391 U. S. 367, 378 (1968). As said by Mr. Justice Douglas, the author of *Oestereich,* in his concurring opinion in *Clark* v. *Gabriel, supra,* —— U. S. at ——, "it takes the extreme case where the Board can be said to flout the law, as it did in Oestereich v. Selective Service, ante, p. ——, to give preinduction review of its actions."

The argument that the Board "flouts the law" so as to require preinduction review of its actions whenever its proceedings are claimed to violate the Constitution, although these were consistent with the Selective Service Act, was rejected *sub silentio* in *Gabriel.* Although the opinion in that case did not specifically refer to any constitutional

issues raised, the Government's Jurisdictional Statement shows that Gabriel asserted violations of First and Fifth Amendment rights, and also apparently claimed that the Selective Service system involves unconstitutional delegations of the legislative, executive, and judicial powers. The Court could readily have passed only on such of Gabriel's points as did not require inquiry into the findings of fact or exercise of discretion of the individual Board. Instead, acting under §10(b)(3), it refused to consider any of Gabriel's claims, saying

> We find no constitutional objection to Congress' thus requiring that assertion of a conscientious objector's claims such as those advanced by appellee be deferred until after induction, if that is the course he chooses, whereupon habeas corpus would be an available remedy, or until defense of the criminal prosecution which would follow should he press his objections to his classification to the point of refusing to submit to induction.

We do not intimate that Breen's claims that his reclassification because of the return of his certificate violated his First Amendment rights to protest, as to which see *United States* v. *O'Brien, supra,* and his Fifth Amendment rights to adequate standards and notice, are not substantial. We hold only that they must be asserted in the ways to which Congress plainly limited him, to wit, refusal to submit to induction or post-induction habeas corpus.

It remains only to add that the decision that a three-judge court was not required was correct. Breen did not seek an injunction "restraining the enforcement, operation or execution" of §10(b)(3), 28 U. S. C. §2282; rather the Government raised that statute as a bar. See *Int'l Ladies Garment Workers Union* v. *Donnelly,* 304 U. S. 243, 251

(1938); *Flemming* v. *Nestor*, 363 U. S. 603 (1960); *Petersen* v. *Clark*, 285 F. Supp. 698 (N. D. Calif. 1968).

Affirmed.

FEINBERG, *Circuit Judge* (dissenting):

I respectfully dissent.

The underlying issue in plaintiff's action is whether the Selective Service delinquency procedure, as applied to a registrant who is delinquent because he protests national policy, is proper. It is now clear that such delinquency reclassification is not lawful if the registrant so treated happens to qualify for a statutory exemption. In *Oestereich* v. *Selective Service System Local Board No. 11*, 37 U. S. L. W. 4053 (U. S. Dec. 16, 1968), five members of the Supreme Court characterized use of the delinquency procedure in that situation as "basically lawless," making the local draft boards "free-wheeling agencies meting out their brand of justice in a vindictive manner."[1] A sixth member

---

1 We can find no authorization for that use of delinquency. Even if Congress had authorized the Boards to revoke statutory exemptions by means of delinquency classifications, serious questions would arise if Congress were silent and did not prescribe standards to govern the Boards' actions. There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets its terms and conditions, a Board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal of the exemption. So to hold would make the Boards free-wheeling agencies meting out their brand of justice in a vindictive manner.

Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption. The Solicitor General confesses error on the use by Selective Service of delinquency proceedings for that purpose.

We deal with conduct of a local Board that is basically lawless. It is no different in constitutional implications from a case where induction of an ordained minister or other clearly exempt person is ordered (a) to retaliate against the person because of his political views or (b) to bear down on him for his religious views or his racial attitudes or (c) to get him out of town so that the amorous interests of a Board

of the Court, Mr. Justice Harlan, concurred in the holding that the delinquency reclassification in that case was improper and characterized as "nonfrivolous" the arguments made there that the entire procedure was unconstitutional "punishment." *Id.* at 4056 n. 6. Therefore, there can be no doubt that the basic question that plaintiff seeks to raise—whether he was ordered inducted by an illegal procedure—is substantial, even though he has not yet been able to convince a court that it should decide the issue.

The precise question before us is whether plaintiff is now entitled to such a judicial forum without making the harsh and risky choice of defying induction (and inviting criminal prosecution) or of submitting to induction and attempting to obtain habeas corpus. In *Oestereich*, the Court construed section 10(b)(3) of the Military Selective Service Act of 1967, 50 U. S. C. App. §460(b)(3), to relieve the registrant of that dilemma; in *Clark* v. *Gabriel*, 37 U. S. L. W. 3217 (U. S. Dec. 16, 1968), it did not. As an inferior federal court, we must attempt to follow the teaching of these cases, as my brothers point out. However, doing so leads me to a contrary result.

---

member might be better served. See *Townsend* v. *Zimmerman*, 237 F. 2d 376. In such instances, as in the present one, there is no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved. The case we decide today involves a clear departure by the Board from its statutory mandate. To hold that a person deprived of his statutory exemption in such a blatantly lawless manner must either be inducted and raise his protest through habeas corpus or defy induction and defend his refusal in a criminal prosecution is to construe the Act with unnecessary harshness. As the Solicitor General suggests, such literalness does violence to the clear mandate of §6(g) governing the exemption. Our construction leaves §10(b)(3) unimpaired in the normal operations of the Act. [37 U. S. L. W. at 4054.]

It is true that *Oestereich* involved an *exemption* for divinity students, which the local board "blatantly" disregarded, while here plaintiff relies on a *deferment* for undergraduates. But that deferment is quite plain in the statute; section 6(h)(1) of the Military Selective Service Act of 1967, 50 U. S. C. App. §456(h)(1), provides:

> Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under

> the provisions of subsection (i) of this section after attaining the nineteenth anniversary of the date of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term "prime age group" means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.

Thus, Congress has explicitly made it national policy to provide deferments for "persons satisfactorily pursuing a full-time course of instruction at a college," which continue until the student reaches the age of 24 or obtains his degree, unless his studies are unsatisfactory. Moreover, such deferments are not to be "substantially restricted or terminated" unless the President finds "that the needs of the Armed Forces require such action." This is about as clear a statement of congressional intent as you can get, made all the more emphatic by its appearance in the Selective Service Act for the first time in the 1967 amendments.[2]

---

2 See Davis & Dolbeare, Selective Service: Present Impact and Future Prospects, 1967 Wis. L. Rev. 892, 909; Note, Changes in the Draft: The Military Selective Service Act of 1967, 4 Colum. J. L. & Soc. Prob. 120, 136-37 (1968). Prior to 1967, the President was authorized —not required—to provide for such deferment of students as was "found to be necessary to the maintenance of the national health, safety, or interest," former 50 U. S. C. App. §456(h); by regulation the deferment of individual students was left to the discretion of the local board, see former 32 C. F. R. §1622.25.

I cannot satisfactorily distinguish this case from *Oestereich*. Each involves a clear statutory grant by Congress to a specified class of registrants of the right not to be inducted into military service, although in this case the right is referred to as a deferment rather than an exemption. The Court's observations in *Oestereich* are therefore equally apt here:

> Since the exemption granted divinity students is plain and unequivocal and in no way contested here, and since the scope of the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right, or sufficiently buttressed by legislative standards, we conclude that pre-induction judicial review is not precluded in cases of this type. [Footnote omitted.]

37 U. S. L. W. at 4054-55. Indeed, the applicability of the reasoning of *Oestereich* to the situation here was clearly foreseen by the three dissenting Justices in that case.[3]

In reaching a contrary view, my brothers rely on that portion of section 6(h)(1) which qualifies the statutory command for student deferments as subject to "such rules and regulations as [the President] may prescribe." But

---

3 The dissenters wrote, 37 U. S. L. W. at 4058 n. 9:

> The Court seems to limit its holding to statutory "exemptions"; yet "deferments" may just as "plainly" preclude a registrant's induction. See, *e.g.*, 50 App. U. S. C. §456(h)(1) (Supp. III, 1968); 32 CFR §1622.25 (1968) (full-time college students).
>
> Cf. *Kimball* v. *Selective Serv. Local Bd. No. 15*, 283 F. Supp. 606, 608 (S. D. N. Y. 1968) (enjoining induction of plaintiff): "It is submitted that the distinction attempted to be drawn by the Government between an 'exemption' under §456(g) and a 'deferment' under §456(h) is one without legal significance." A notice of appeal from a similar subsequent order involving a different plaintiff in the same case has been filed in this court. No. MR 2219, 2d Cir., Aug. 13, 1968.

that clause is itself qualified by the introductory phrase in the first sentence, "Except as otherwise provided in this paragraph." The paragraph does, as already noted, otherwise provide both that student deferments shall continue until the occurrence of specified events and also that such deferments shall not be "substantially restricted" by the President unless he finds that "the needs of the Armed Forces" require it.[4] The former limitation is not relied on by the Government. As to the latter, I see no such finding in Executive Order No. 11360, 32 Fed. Reg. 9787, 9794 (1967), relied on by the majority. Moreover, it would seem that authority to promulgate "rules and regulations" would extend only to those which would sensibly be relevant to the deferment, e.g., the obtaining of certain grades, referred to by the majority, the furnishing of proof of bona fide undergraduate status, or the definition of a "full-time" student. My brothers also rely on the fleeting reference in the last sentence of section 6(h)(1) to "delinquents," which does not deserve the significance attributed to it. The Selective Service System made a similar argument in *Oestereich* without success. Finally, the fact that the requirement of continued possession of a registration certificate serves a legitimate purpose is beside the point. The underlying issue is whether the proper agency to "punish" transgressions of that rule is a court, under traditional safeguards, or an unfettered draft board, consisting of "part-time uncompensated members," in a proceeding essentially "nonjudicial." 37 U. S. L. W. at 4056 (Harlan, *J.*).

The foregoing analysis of *Oestereich* and its effect on this case is strengthened by close examination of the Court's

---

4 See Note, Changes in the Draft: The Military Selective Service Act of 1967, 4 Colum. J. L. & Soc. Prob. 120, 140 n. 158 (1968).

decision on the same day in *Clark* v. *Gabriel, supra.*[5] In that case, the registrant's draft board rejected his claim to classification as a conscientious objector; the Court held that section 10(b)(3) prevented review until after induction or criminal prosecution. The Court in *Gabriel* distinguished *Oestereich* as follows, 37 U. S. L. W. at 3217:

> In Oestereich the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the board. Oestereich, as a divinity student, was by statute unconditionally entitled to exemption. Here, by contrast, there is no doubt of the board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being "sustained by the local board." . . .
>
> Here the board has exercised its statutory discretion to pass on a particular request for classification, "evaluating evidence and . . . determining whether a claimed exemption is deserved." Oestereich v. Selective Service System Local Board No. 11, ante, p. ——. A local board must make such a decision in respect of each of the many classification claims presented to it. To allow pre-induction judicial review of such determinations would be to permit precisely the kind of "litigious interruptions of procedures to provide

---

5 This was a *per curiam* opinion by four members of the Court. Mr. Justice Douglas filed a separate concurrence, the dissenters in *Oestereich* concurred for the reasons they expressed in that case, and Mr. Justice Black thought that probable jurisdiction should be noted and the case set down for argument.

necessary military manpower" . . . which Congress sought to prevent when it enacted §10(b), (3).

The differences between this case and *Gabriel* are clear. In *Gabriel,* the registrant's right to his classification depended "upon an act of judgment by the board." No such discretionary decision is involved here. Section 6(h)(1) contains no similar condition that a registrant's claim for student deferment be "sustained by the local board"; in any event, there is no doubt that Breen was a full-time student at a college. Therefore, whether the registrant in *Gabriel* raised constitutional issues, as the majority states, is not crucial. What is more significant is that in *Gabriel,* unlike both this case and *Oestereich,* the action of the draft board "inescapably involves a determination of fact and an exercise of judgment."

In short, I believe this case is governed by the reasoning in *Oestereich.* If the registrant there was entitled before induction to a judicial hearing on his claims, he should get no less here.[6] Accordingly, I would remand to the District Court for Connecticut for that purpose.

---

6 It should be noted that the same result would be reached if the approach of Mr. Justice Harlan in *Oestereich* were adopted. Plaintiff here, like the plaintiff in *Oestereich,* contends "that the procedure employed by the board is invalid on its face." 37 U. S. L. W. at 4055. Similarly, such a claim

> does not invite the court to review the factual and discretionary decisions inherent in the "classification or processing" of registrants, and does not, therefore, present opportunity for protracted delay. . . . [I]t presents an issue beyond the competence of the Selective Service boards to hear and determine.

Id. at 4055-56.

Memorandum of Decision on Plaintiff's Motions for a Preliminary Injunction and for the Convening of a Three-Judge District Court and on Defendant's Motion to Dismiss

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. 12,422

TIMOTHY J. BREEN,

Plaintiff,

—v.—

SELECTIVE SERVICE LOCAL BOARD No. 16, Bridgeport, Connecticut and BRIG. GEN. ERNEST E. NOVEY, Individually and as Director of the Selective Service System for Connecticut,

Defendants.

Appearances:

LAWRENCE P. WEISMAN, of Cohen & Wolf, Bridgeport, Conn., and Emanuel Margolis, Stamford, Conn., for plaintiff.

JON O. NEWMAN, U. S. Atty., Hartford, Conn., for defendants.

In this action brought to challenge defendants' right to induct plaintiff into the armed forces, plaintiff has moved for a preliminary injunction to restrain defendants from continuing to process him for induction. Defendants op-

pose this motion and have moved for dismissal of the complaint on the ground that jurisdiction is lacking in this Court. Because the Court agrees that plaintiff's complaint fails to state a cause of action over which the Court has jurisdiction, plaintiff's motion for a preliminary injunction is denied and the complaint is dismissed. Plaintiff's motion for the convening of a three-judge district court to consider the issues here presented is also denied.

On November 16, 1967, plaintiff delivered his draft card to a clergyman in Boston, Massachusetts, for return to the government. Allegedly the sole purpose of this act was to protest United States' involvement in the war in Vietnam.

The Military Selective Service Act of 1967, 50 App. U.S.C. §451 et seq., authorizes the President of the United States to prescribe necessary rules and regulations to carry out its provisions. 50 App. U.S.C. §460(b)(1). Pursuant to this authorization, Sections 1617.1 and 1623.5 of the Selective Service regulations (32 C.F.R. §§1617.1 and 1623.5 (1967)) require a person registered and classified by the selective service to have at all times in his personal possession his Registration Certificate and a valid Notice of Classification. Both items are commonly referred to as draft cards. In addition, §1602.4 of the regulations (32 C.F.R. §1602.4 (1967)) defines a "delinquent" as "a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law." Sections 1642.1-1642.46 (32 C.F.R. §§1642.1-1642.46 (1967)) govern the treatment of delinquents. In relevant part they provide that a person failing to perform any duty required under the law may be declared a delinquent by the Board. (32 C.F.R. §1642.4(a) (1967)). When this is done the Board

must send a Delinquency Notice to the registrant setting forth the duty which the registrant has failed to perform. (32 C.F.R. §1642.4(b) (1967)). Once having declared a registrant delinquent the Board may proceed to reclassify the registrant into Class I-A (32 C.F.R. §1642.12 (1967)), and having done so, the Board must order him to report for induction before all others, even before volunteers (32 C.F.R. §§1642.13 and 1631.7 (1967)).

On January 9, 1968, plaintiff's Draftboard, located in Bridgeport, Connecticut, mailed him a Delinquency Notice, informing him that on January 8, 1968, he had been "declared delinquent" because of "Failure to have Registration Certificate in your possession." Also on January 9, 1968, plaintiff was reclassified from Class II-S (student deferment) to Class I-A. On January 11, 1968 he was ordered to report for a pre-induction physical, but at his request, the examination was transferred to Boston, Massachusetts and postponed until March 4, 1968.

Plaintiff filed the original complaint in this action on February 20, 1968. On March 1, 1968, plaintiff filed a substituted complaint and the instant motion for a preliminary injunction. Plaintiff also sought and obtained at that time an ex parte temporary restraining order.

A hearing was held on March 8, 1968 on plaintiff's motion for a preliminary injunction. Also filed and heard at that time was plaintiff's motion for the convening of a three-judge district court pursuant to 28 U.S.C. §2282 to consider the request for a preliminary injunction and for the extension of the temporary restraining order until the three-judge district court could act. In addition, defendants' counsel filed, and the Court heard, a motion to dismiss the complaint for lack of jurisdiction.

At the conclusion of the hearing the Court dissolved the temporary restraining order but otherwise reserved decision on the pending motions.

Plaintiff's complaint avers that the draftboard was without jurisdiction to declare plaintiff a delinquent and to reclassify him, and that its conduct in so doing was unconstitutional. The Board's actions, plaintiff claims, were meant as a penalty and will have the effect of inhibiting the exercise of First Amendment rights by himself and others. Plaintiff also attacks the regulations described above as being unconstitutional on their face and as applied, claiming that they violate the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. Plaintiff further claims that his reclassification into Class I-A simultaneously with the mailing to him of notice that he was "delinquent" and prior to his receipt of that notice violated Selective Service regulations and due process of law. Finally, plaintiff contends that his reclassification resulted from an improper "directive" concerning reclassification sent by the Director of the Selective Service System, Lt. Gen. Lewis B. Hershey, to draftboards on October 26, 1967.

Plaintiff asks the Court in his complaint to declare that the designation of plaintiff as delinquent and his reclassification are null and void; to enjoin defendants from taking further steps to induct or reclassify him on the basis of his turning in his draft card; to declare the Selective Service regulations referred to above unconstitutional on their face and as applied; and to declare the Hershey "directive" void on its face and as applied. Plaintiff also demands $20,000 in damages.

The threshold question raised by plaintiff's complaint and motion for a preliminary injunction and brought into

focus by defendants' motion to dismiss is whether plaintiff states a cause of action over which this Court has jurisdiction.

Plaintiff claims jurisdiction pursuant to 28 U.S.C. §§1331, 1343 and 2201, and asserts that the matter in controversy exceeds the value of $10,000, exclusive of interest and costs, and arises under the Constitution and laws of the United States including 42 U.S.C. §§1981 and 1983.

It is clear that 28 U.S.C. §2201 does not confer jurisdiction but merely creates a remedy where jurisdiction otherwise exists. *Skelly Oil* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950).

Nor is 28 U.S.C. §1343 of any help to plaintiff. Subsections (1) and (2) of that provision only confer jurisdiction in instances where damages are sought with respect to violations of 42 U.S.C. §1985; plaintiff does not allege, nor could he properly allege, a violation of that section. Subsection (3) applies only where a state law, statute, ordinance, regulation, custom or usage is involved; none of these is involved here. Subsection (4) confers jurisdiction where relief is sought under an Act of Congress providing for the protection of civil rights. The only such laws relied upon by plaintiff, 42 U.S.C. §§1981 and 1983, require state action; no state action is alleged here. See *Oestereich* v. *Selective Service System Local Bd. No. 11*, —— F.Supp. —— (D. Wyo. Feb. 6, 1968), *aff'd*, —— F.2d —— (10 Cir. Feb. 21, 1968).

Nevertheless, this action does arise under the Constitution and laws of the United States and as such 28 U.S.C. §1331 would generally confer jurisdiction if the matter in controversy exceeded the sum or value of $10,000, ex-

clusive of interest and costs. Although plaintiff alleges that the action involves the requisite jurisdictional amount and seeks to recover $20,000 in damages, a very real question exists whether the necessary amount is in fact in controversy. See *Wolff* v. *Selective Service Local Bd. No. 16*, 372 F.2d 817, 826 (2 Cir. 1967). *Cf. Oestereich* v. *Selective Service System Local Bd. No. 11, supra.*

But assuming the requisite jurisdictional amount has been sufficiently demonstrated, the Court is convinced that §8(c) of the Military Selective Service Act of 1967, amending Section 10(b)(3) of the Universal Military Training and Service Act (50 App. U.S.C. §460(b)(3)), specifically deprives this Court of whatever jurisdiction it might otherwise have over this action.

Prior to its amendment in June, 1967, Section 10(b)(3) provided that decisions of local draftboards with respect to classifications "shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe." The United States Supreme Court in *Estep* v. *United States*, 327 U.S. 114, 122-23 (1946) interpreted this to mean that:

> ". . . Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the Courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

Having thus defined the narrow scope of judicial review, the Court proceeded to interpret Congressional intent as to when that review could take place. After *Falbo* v. *United States,* 320 U.S. 549 (1944), it appeared that a registrant could not even defend a criminal prosecution under the Act on the ground that his Board's classification action was without jurisdiction; rather, review could come only by way of habeas corpus after his actual induction. But in *Estep* the Court held that where all administrative remedies had been exhausted, the defense could be raised in a criminal prosecution for the simple reason that Congress could not have intended to require "the Courts to march up the hill when it is apparent from the beginning that they will have to march down again." *Id.* at 125. The court, however, was careful to point out that it was only this practical reason which resulted in its conclusion, stating that:

> "We do not suggest that because Congress has provided one judicial remedy another should be implied. We may assume that where only one judicial remedy is provided, it normally would be deemed exclusive." *Id.*

Implicit in the Court's reasoning is that Congress, in the context of the Selective Service System, can constitutionally limit judicial review of administrative action to a point in time subsequent to the institution of criminal proceedings or actual induction of the registrant. This principle was again recognized by the court in *Witmer* v. *United States,* 348 U.S. 375, 377 (1955).

Several courts, however, without questioning Congressional power to provide otherwise, have held that Section

10(b)(3) did not deprive them of jurisdiction to review classification prior to the exhaustion of administrative remedies and the institution of criminal proceedings.

Most notable of these cases was *Wolff* v. *Selective Service Local Bd. No. 16, supra,* a decision by the Court of Appeals for this Circuit. The plaintiff in that case was attempting to challenge his delinquency status and reclassification which resulted from his participation in demonstrations against United States involvement in Vietnam. Judge Medina, having found that Section 10(b)(3) did not deprive the court of jurisdiction, then held that the facts of the case warranted the court's setting aside its own doctrines of justiciability and exhaustion of administrative remedies.

Of particular relevancy was the court's finding that the Board's action was completely without authority of any regulation and as such constituted a "chilling effect" upon the exercise of "fragile and sensitive" constitutional rights within the purview of *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965). *Id.* at 824. The facts of the instant case are, of course, quite different from those in *Wolff.* Here the Board's actions were entirely by virtue of regulations. The existence of a standard permits the registrant to know exactly what conduct will result in Board action and as such, the far-reaching "chilling effect" feared by the court in *Wolff* is non-existent. Thus even if the first premise of *Wolff,* that Section 10(b)(3) did not deprive this Court of jurisdiction, were still valid, the Court would feel compelled in this instance to decline to intervene until plaintiff had completely exhausted his administrative remedies.

But that first premise of *Wolff* does not have the force of authority which it would otherwise have for this Court

in view of Congressional action taken since that decision. That action was the amendment of Section 10(b)(3) in June, 1967 by Section 8(c) of the Military Selective Service Act of 1967 so as to read as follows:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant." 50 App. U.S.C. §460 (b)(3)

Whatever doubt there was as to Congressional intent concerning the former Section 10(b)(3) has thus now been eliminated.

Plaintiff argues that Congress merely intended to codify such cases as *Wolff*. That just the opposite is true is plainly expressed by the report of the Armed Services Committee of the House of Representatives with respect to the amendment:

> "The committee was disturbed by the apparent inclination of some courts to review the classification action of local or appeal boards before the registrant had exhausted his administrative remedies. Existing law quite clearly precludes such a judicial review

until after a registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order. In view of this inclination of the courts to prematurely inquire into the classification action of local boards, the committee has rewritten this provision of the law so as to more clearly enunciate this principle. The committee was prompted to take this action since continued disregard of this principle of the law by various courts could seriously affect the administration of the Selective Service System." H. Rep. No. 267, 90th Cong. 1st Sess., 7 U.S. Cong. News 1489 (1967)

It is therefore clear that because plaintiff has not exhausted his administrative remedies and has not yet been ordered to report for induction, this Court lacks jurisdiction to entertain plaintiff's complaint. *Oestereich* v. *Selective Service System Local Bd. No. 11, supra; Carpenter* v. *Hendrix,* —— F.Supp. —— (N.D. Ga. Nov. 14, 1967) (36 U.S. Law Week 2349); *Moskowitz* v. *Kindt,* 273 F.Supp. 646 (E.D. Pa. 1967).

In view of *Estep* v. *United States, supra,* and *Witmer* v. *United States, supra,* plaintiff's claim that Congress cannot constitutionally force a registrant to await criminal proceedings or actual induction to test the validity of his classification is without merit. Whether the amendment intends to preclude the use of habeas corpus and, if so, whether it would therefore be unconstitutional, is not in issue here as plaintiff has not yet been inducted into the armed services and is not bringing this action upon a petition for a writ of habeas corpus. *Moskowitz* v. *Kindt, supra,* at 648-49.

Plaintiff has moved for the convening of a three-judge district court pursuant to 28 U.S.C. §2282 and contends that a single judge is without power even to dismiss the complaint for lack of jurisdiction. First, assuming there were federal court jurisdiction, 28 U.S.C. §2282 requires the convening of a three-judge district court only when a complaint seeks an injunction against the enforcement of an Act of Congress and not when the injunction is sought against the enforcement of regulations promulgated pursuant to a general authorization contained therein. *Sardino* v. *Federal Reserve Bank of New York,* 361 F.2d 106, 113-116 (2 Cir. 1966). Secondly, it is not only within the power of, but it is incumbent upon, the single judge to whom the application is made to determine whether there is any basis for federal jurisdiction. *Cf. Idlewild Liquor Corp.* v. *Epstein,* 370 U.S. 713, 715 (1962). If in the course of making that determination, the construction and constitutionality of a federal statute is drawn into question, as plaintiff attempted to do here with respect to Section 8(c) of the Military Selective Service Act of 1967, the Court is not required by 28 U.S.C. §2282 to halt its determination and convene a three-judge district court to consider the matter. Not only must the complaint on its face raise a substantial question as to the constitutionality of a federal statute but it must also seek an injunction against its enforcement, neither of which is done by plaintiff's complaint with respect to Section 8(c) of the Military Selective Service Act of 1967. See, *Flemming* v. *Nestor,* 363 U.S. 603, 606-08 (1960). Therefore, plaintiff's motion for the convening of a three-judge district court must be denied.

Order

ORDERED that:

(1) Plaintiff's motion for a preliminary injunction is denied.

(2) Plaintiff's motion for the convening of a three-judge district court is denied.

(3) Plaintiff's complaint is dismissed for lack of subject matter jurisdiction, but without costs.

Dated at New Haven, Connecticut, this 13th day of March, 1968.

WILLIAM H. TIMBERS
William H. Timbers
Chief Judge

Statutes and Regulations Involved

50 App. U.S.C. Sec. 460(b)(3):

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

50 App. U.S.C. Sec. 456(h)(1):

> "Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the

President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under the provisions of subsection (i) of this section after attaining the nineteenth anniversary of the date of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term 'prime age group' means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers."

32 C.F.R. Sec. 1622.25:

Class II-S: Registrant deferred because of activity in study.

(a) In Class II-S shall be placed any registrant who has requested such deferment and who is satisfac-

torily pursuing a full-time course of instruction at a college, university, or similar institution of learning, such deferment to continue until such registrant completes the requirement for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever occurs first.

(b) In determining eligibility for deferment in Class II-S, a student's "academic year" shall include the 12-month period following the beginning of his course of study.

(c) A student shall be deemed to be "satisfactorily pursuing a full-time course of instruction" when, during his academic year, he has earned, as a minimum, credits toward his degree which, when added to any credits earned during prior academic years, represent a proportion of the total number required to earn his degree at least equal to the proportion which the number of academic years completed bears to the normal number of years established by the school to obtain such degree. For example, a student pursuing a four-year course should have earned 25% of the credits required for his baccalaureate degree at the end of his first academic year, 50% at the end of his second academic year, and 75% at the end of his third academic year.

(d) It shall be the registrant's duty to provide the local board each year with evidence that he is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning.

32 C.F.R. Sec. 1642.4:

Declaration of delinquency status and removal therefrom.

(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101).

(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form No. 101).

SELECTIVE SERVICE SYSTEM

Appeal Not Request

DELINQUENCY NOTICE

APPENDIX D

Jan. 8, 1968
(Date Declared Delinquent)

Jan. 9, 1968
(Date of Mailing)

[illegible] 15
[illegible]
Bridgeport, [illegible]
(Local Board Stamp)

SELECTIVE SERVICE NO.
6 16 43 116

To Timothy John Breen
(First) (Middle) (Last)

Address 31 Gorham Avenue
(Street and Number or RFD Route)

Westport, Fairfield, Conn.
(City, Town, or Village) (County) (State) (ZIP Code)

1. You are hereby notified that this Local Board has declared you to be a delinquent because of your failure to perform the following duty or duties required of you under the selective service law.

FAILURE TO HAVE REGISTRATION CERTIFICATE IN YOUR POSSESSION.

2. You are hereby directed to report to this Local Board immediately in person or by mail, or to take this notice to the Local Board nearest you for advice as to what you should do.

3. Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act as amended, which is punishable by imprisonment for as much as 5 years or a fine of as much as $10,000 or by both such fine and imprisonment. You may be classified in class 1-A as a delinquent and ordered to report for induction.

A. C. Wallace
(Member or Clerk of Local Board)

INSTRUCTIONS

A Delinquency Notice (SSS Form 304) shall be prepared by the Local Board whenever it declares the registrant to be a delinquent because of his failure to perform any duty or duties required of him other than failure to comply with an Order to Report for Induction (SSS Form 252), or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153). This notice shall be prepared in triplicate and the specific duty or duties which the registrant has failed to perform shall be described in detail in the space provided. The Local Board shall: (a) mail the original to the registrant at his last known address; (b) file a copy in the registrants Cover Sheet (SSS Form 21) and (c) mail a copy to the State Director of Selective Service.

SSS Form 304 (5-25-65)

U.S. GOVERNMENT PRINTING OFFICE

916-215

[New York Times, Thursday, November 9, 1967]

Texts of Letter and Memo on the Draft

Special to The New York Times

Washington, *Nov. 8—Following is the text of a letter, dated Oct. 26, to all members of the Selective Service system from the director of Selective Service Lieut. Gen. Lewis B. Hershey, and of a memorandum dated Oct. 24, from General Hershey on draft cards:*

The Letter

The basic purpose and the objective of the Selective Service system is the survival of the United States. The principal means used to that end is the military obligation placed by law upon all males of specfied age groups. The complexities of the means of assuring survival are recognized by the broad authority for deferment from military service in the national health, safety, or interest.

Important facts, too often forgotten or ignored, are that the military obligation for liable age groups is universal and that deferments are given only when they serve the national interest. It is obvious that any action that violates the military selective service act or the regulations, or the related processes cannot be in the national interest.

It follows that those who violate them should be denied deferment in the national interest. It also follows that illegal activity which interferes with recruiting or causes refusal of duty in the military of naval forces could not by any stretch of the imagination be construed as being in support of the national interest.

The Selective Service system has always recognized that it was created to provide registrants for the armed forces, rather than to secure their punishment for disobedience of the act and regulations. There occasionally will be registrants, however, who will refuse to comply with their legal responsibilities, or who will fail to report as ordered, or refuse to be inducted. For these registrants, prosecution in the courts of the United States must follow with promptness and effectiveness. All members of the Selective Service system must give every possible assistance to every law enforcement agency and especially to United States attorneys.

It is to be hoped that misguided registrants will recognize the long-range significance of accepting their obligations now, rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions, or possibly honest but wholly illegal advice, or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens.

Demonstrations, when they become illegal, have produced and will continue to produce much evidence that relates to the basis for classification and, in some instances, even to violation of the act and regulations. Any material of this nature received in national headquarters or any other segment of the system should be sent to state directors for forwarding to appropriate local boards for their consideration.

A local board, upon receipt of this information, may reopen the classification of the registrant, classify him anew, and if evidence of violation of the act and regulations is established, also to declare the registrant to be a delinquent and to process him accordingly. This should

include all registrants with remaining liability up to 35 years of age.

If the United States Attorney should desire to prosecute before the local board has ordered the registrant for induction, full cooperation will be given him and developments in the case should be reported to the state director and by him to national headquarters.

Evidence received from any source indicating efforts by nonregistrants to prevent induction or in any way interfere illegally with the operation of the Military Selective Service Act or with recruiting or its related processes, will be reported in as great detail as facts are available to state headquarters and national headquarters so that they may be made available to United States attorneys.

Registrants presently in classes IV-F or I-Y who have already been reported for delinquency, if they are found still to be delinquent, should again be ordered to report for physical examination to ascertain whether they may be acceptable in the light of current circumstances.

All elements of the Selective Service system are urged to expedite responsive classification and the processing of delinquents to the greatest possible extent consistent with sound procedure.

MEMORANDUM

Subject: Disposition of Abandoned or Mutilated Registration Certificate and Notices of Classification.

1. Whenever an abandoned or mutilated registration certificate or current notice of classification reaches a local board, and the card was originally issued to a registrant by some other board, it should be forwarded to the state

director of selective service, who will forward it to the appropriate local board if within the state, or the appropriate state director if the board of origin is outside the state.

2. Whenever a local board receives an abandoned or mutilated registration certificate or current notice of classification which had been issued to one of its own registrants, the following action is recommended:

(A) Declare the registrant to be delinquent for failure to have the card in his possession.

(B) Reclassify the registrant into a class available for service as a delinquent.

(C) At the expiration of the time for taking an appeal, if no appeal has been taken, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States attorney for prosecution.

(D) If appeal is taken and the registrant is retained in a class available for service by the appeal board, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States Attorney for prosecution.